(31,839, 31,840)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 337

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, ET AL., ETC., PETITIONERS,

vs.

EQUITABLE TRUST COMPANY OF NEW YORK, TRUSTEE IN BANKRUPTCY

No. 338

EQUITABLE TRUST COMPANY OF NEW YORK, TRUSTEE IN BANKRUPTCY, PETITIONER,

vs.

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Order for Omnibus Reclamation Proceedings.

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, et als., trading as KNAUTH, NACHOD & KUHNE, etc., etc., Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankruptcy No. 34,996.

2

On reading and filing the petition of Middleton S. Borland, Receiver herein, verified the 7th day of February, 1924, the order to show cause signed by Judge John C. Knox, United States District Judge, dated February 8th, 1924, the affidavit of A. McMillan, principal clerk of the "Evening Post" verified the 14th day of February, 1924, as to the publication of notice, and the affidavit of H. B. Duncan-Clark, verified the 18th day of February, 1924, as to the mailing of such notice, all pursuant to the directions contained in the aforesaid order to show cause, and the matter having come on for hearing before this court on the 19th day of March, 1924,

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and after hearing Ralph F. Colin of Counsel for the Trustee in support of the order asked for in the order to show cause, and Kremer and Leavitt, Esqs., appearing in opposition thereto, it is now, after due deliberation and on motion of James N. Rosenberg, attorney for the Receiver,

ORDERED that all creditors of the above named bankrupts and alleged bankrupt, and all other persons, firms or corporations who claim specific moneys, bonds, stocks, securities, or other property or any interest therein, or any part thereof, or the proceeds thereof, in the possession, custody, or control of the Receiver herein, or to which he or any Trustee in Bankruptcy herein may be now or hereafter entitled, or which may come into his possession, file their proofs of claim in and to said specific moneys, stocks, bonds, securities or other property, or any part thereof, or the proceeds thereof, duly sworn to, in the office of Robert P. Stephenson, Esq., as Special Master herein, at 32 Broadway, in the Borough of Manhattan, City of New York, on or before the 19th day of June, 1924, and on or before said date, serve a copy of such proof of claim upon the attorney for the Receiver, James N. Rosenberg, Esq., 74 Broadway, Borough of Manhattan, City of New York, and it is further

ORDERED that all creditors, persons, firms or corporations who shall fail to file such claims on or before the said 19th day of June, 1924, are forever barred and foreclosed from making or asserting any claim, title or ownership in and to any of said specific moneys, bonds, stocks, securities or other property, or any part thereof, or the proceeds thereof, now in or which may hereafter come into the possession of the Receiver or any Trustee in Bankruptcy herein, and it is further

ORDERED that a determination of all claims to any right, title or interest in and to any or all of the said specific moneys, stocks, bonds, securities or other property, or any part thereof, or the proceeds thereof, filed as aforesaid, be referred to Robert P. Stephenson, Esq., as Special Master, to hear the allegations, proofs and testimony of such creditors and claimants, and that the said Special Master report to this court his opinion thereon, and it is further

ORDERED that all creditors, or claimants, who have heretofore instituted reclamation proceedings herein and which are pending and undetermined are directed to intervene herein, and that petitions or affidavits in said reclamation proceedings heretofore instituted, be considered as claims filed pursuant to this order, and it is further

ORDERED that any claims or petitions in reclamation filed by any creditor within the period limited by this order shall, in the event that such claims or petitions in reclamation are not sustained as claims or petitions in reclamation, be deemed and accepted as filed as proofs of claim of general creditors, subject, however, to the right of the Trustee to contest upon the merits any such claim as a general creditor's claim, and it is further

ORDERED that no further notice to creditors or claimants herein of the entry of an order in this proceeding is necessary, beyond the mailing and publication of the order to show cause as therein directed.

WM. BONDY,
U. S. D. J.

New York, April 23, 1924.

10 **Petition for Reclamation.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, Alleged Bankrupts.	In Bankruptcy No. 34996-75.

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To the District Court of the United States:

The petition of Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hochstein, copartners doing business under the firm name and style of N. Latzko & A. Popper, appearing by Brodek & Raphael, their solicitors, respectfully shows:

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FIRST.—That at all the times hereinafter mentioned, petitioners were and that they now are copartners engaged in business as international bankers and maintaining a banking house in the City of Budapest, Hungary, under the firm name and style of N. Latzko & A. Popper.

13

SECOND.—That at all the times hereinafter mentioned, the above named Oscar L. Gubelman, Rollin C. Newton, Theodore W. Knauth, James F. Shaw, Herbert B. Smithers, John R. Hall and Mary W. Knauth were copartners engaged in business as international bankers and maintaining a banking house in the Borough of Manhattan, City, County and State of New York, in the Southern District of New York, under the firm name and style of Knauth, Nachod & Kuhne (hereinafter referred to as "K N & K").

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THIRD.—That heretofore and on June 15, 1923, at 10:30 P. M. an involuntary petition in bankruptcy was filed with Hon. John C. Knox, one of the judges of the United States District Court for the Southern District of New York, by three creditors of said K N & K, praying that said K N & K be adjudged bankrupts and on the same day, Middleton S. Borland was duly appointed temporary receiver in bankruptcy of the said K N & K by the said court, with the usual powers and authority of a temporary receiver in bankruptcy, and duly qualified as such receiver on June 16, 1923, and duly filed his official bond and entered into possession 15 of all of the property of the said alleged bankrupts. That on June 16, 1923, at 9:30 A. M. said involuntary petition in bankruptcy against said K N & K was duly filed in the office of the Clerk of said United States District Court. That thereafter and on July 20, 1923, said order of appointment of the said temporary receiver was, by an order of said court, duly made and entered in the office of the clerk of the said court, extended individually to all the copartners forming the copartnership known under the name and style of Knauth,

16 Nachod & Kuhne, and said Middleton S. Borland by said order of July 20, 1923, was duly appointed and duly qualified as temporary receiver for each and every individual member of said copartnership, and entered into possession of all of the property of the said alleged bankrupts.

On information and belief, said petitioners further show:

FOURTH.—That at all the times hereinafter mentioned, and prior to the appointment of said re-
17 ceiver, said K N & K acted as the New York correspondents of petitioners; that the nature of the dealings between petitioners and said K N & K was in general, the transmission of funds by petitioners or delivery to said K N & K of evidences of debt by petitioners to be collected by said K N & K for or on behalf of petitioners, and to be placed by said K N & K after collection as aforesaid, to the credit of petitioners' account with said K N & K, from which account payments were made from time to time by said K N & K upon order or request of petitioners, but that petitioners were not to draw
18 upon said K N & K against the deposit of evidences of debt as aforesaid, before the collection of the moneys due upon said evidences of debt by said K N & K.

FIFTH.—That petitioners had no agreement with said K N & K to treat evidences of debt deposited with said K N & K for collection or otherwise, as a deposit of cash, nor that an immediate credit should be given by said K N & K to petitioners upon the receipt of such evidences of debt.

SIXTH.—That petitioners did not treat evidences of debt deposited with said K N & K for collection

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or otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K N & K upon the receipt of any evidences of debt, nor did petitioners draw upon said K N & K against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K N & K.

SEVENTH.—That at all the times herein mentioned, said K N & K had one of their current accounts with the American Exchange National Bank (hereinafter referred to as "National Bank") with 20
its principal place of business in the Borough of Manhattan, said City, County and State, wherein said K N & K deposited certain checks and other evidences of debt payable to said K N & K through the New York Clearing House and otherwise.

EIGHTH.—That heretofore and on the 14th day of June, 1923, petitioners herein caused the Irving Bank-Columbia Trust Company of the City of New York to deposit for their account with said K N & K a check for Three thousand ($3,000) Dollars. That subsequently said check was deposited on said date by said K N & K with the National Bank to 21
be collected by said Bank for the account of said K N & K and credited to the current account of said K N & K with said Bank. That thereafter and on June 15, 1923, the day said petition in bankruptcy was filed against said K N & K and said temporary Receiver for said K N & K was appointed, as aforesaid, said bank presented said check for three thousand ($3,000) Dollars for payment through the New York Clearing House and collected the same, and credited the proceeds so collected to the current account of said K N & K with said bank.

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NINTH.—That on June 15, 1923, and on the same day as said petition in bankruptcy against said K N & K was filed and said temporary Receiver was appointed, as aforesaid, petitioners caused Goldman, Sachs & Company to deliver to said K N & K, a check for Fifteen thousand ($15,000) Dollars, to be collected by said K N & K for the account of petitioners, as aforesaid. That upon said date, petitioners likewise caused the National City Bank of New York to deliver to said K N & K a check for One thousand two hundred and ninety-
23 four ($1,294) Dollars, to be collected by said K N & K for the account of petitioners, as aforesaid.

TENTH.—That the checks mentioned in the preceding paragraph of this petition were deposited on said June 15, 1923, by said K N & K with said National Bank to be collected by said bank for the account of said K N & K and credited to the current account of said K N & K in said bank. That thereafter and on June 16, 1923, and subsequent to the filing of said petition in bankruptcy
24 and the appointment of the said temporary Receiver for said K N & K, said bank presented said checks for Fifteen thousand ($15,000) Dollars and One thousand two hundred and ninety-four ($1,294) Dollars respectively for payment through the New York Clearing House and collected the proceeds thereof, to wit, Sixteen thousand two hundred and ninety-four ($16,294) Dollars, and credited the said sum so received, to the current account of said K N & K with said bank.

ELEVENTH.—That at the time petitioners herein caused said checks aggregating Nineteen thousand two hundred and ninety-four ($19,294) Dollars to be delivered to said K N & K for collection and de-

posit to petitioners' account with said K N & K, as aforesaid, petitioners did not know of the insolvency of said K N & K, nor did petitioner have any knowledge or means of knowing the insolvency of said K N & K.

TWELFTH.—That at the time petitioners herein caused said checks hereinbefore described to be delivered to said K N & K petitioners had a credit balance with said K N & K, amounting to several thousand dollars and were not then, and have not been at any time since then, and are not now, indebted to said K N & K or to said Receiver.

THIRTEENTH.—That at the time said petition in bankruptcy against said K N & K was filed in this court, as aforesaid, the current account of said K N & K with said National Bank did not include Nineteen thousand two hundred and ninety-four ($19,294) Dollars which the petitioners herein caused to be deposited to their account with K N & K as aforesaid, nor were said Nineteen thousand two hundred and ninety-four ($19,294) Dollars at said time part of any money or moneys held by said bank for account of or on deposit from said K N & K, nor were said Nineteen thousand two hundred and ninety-four ($19,294) Dollars or any part thereof in possession of said K N & K.

FOURTEENTH.—That said K N & K accepted said three checks caused to be delivered to them by the petitioners herein as aforesaid, and deposited the same with said National Bank knowing full well that they were insolvent and unable to meet their obligations and at the time when said checks were so accepted and deposited by said K N & K, said K N & K knew of the preparation of the said

original involuntary petition in bankruptcy filed against them as aforesaid and had full knowledge and information concerning the same.

FIFTEENTH.—That at the time said three checks caused to be delivered to said K N & K by petitioners herein were received and collected by said K N & K as aforesaid, said K N & K wrongfully, fraudulently and with intent to defraud the petitioners herein held themselves out as a solvent and solid banking house, and the petitioners relied upon such representations by said K N & K so made and were thereby induced to deliver said checks to said K N & K in due course of petitioners' transactions with said K N & K, while in fact at said time said K N & K were insolvent and were unable to pay their debts in full to their knowledge.

SIXTEENTH.—That at the time of filing of said original petition in bankruptcy against said K N & K and the appointment of said Receiver as aforesaid, said alleged bankrupts were indebted to said National Bank for a loan of Two hundred and fifty-one thousand four hundred and fourteen and 99/100 ($251,414.99) Dollars and that the said bank had on deposit with it by said K N & K various stocks and bonds as security for said loan. That at all times mentioned herein the value of said stocks and bonds so deposited by said K N & K with said bank as said security for said loan, taken at their current market value, was greatly in excess of the amount of said loan, or any other indebtedness of said K N & K to said bank.

SEVENTEENTH.—That thereafter and on June 26, 1923, June 27, 1923, and June 28, 1923, said National Bank pursuant to the instructions received

from and given by said Receiver, sold and disposed of a portion of said stocks and bonds, to wit, to the amount of Twenty thousand four hundred and ninety-seven ($20,497) Dollars, and credited the proceeds of said sale to the liquidation of said loan of said K N & K with said bank. 31

EIGHTEENTH.—That thereafter and on July 12, 1923, said National Bank and said Middleton S. Borland, individually and as said Receiver wrongfully and unlawfully misappropriated, converted and applied the funds which said bank had on deposit to the current account of said K. N. & K. or its Receiver, to wit, Two hundred and twelve thousand and sixty-six and 16/100 ($212,066.16) Dollars, to the payment or liquidation of the balance of said loan due to the said bank from said K N & K. That on said date, said Receiver delivered to said bank his check for Eighteen thousand eight hundred and fifty-one and 83/100 $18,851.83) Dollars, in part payment of said loan, which payment together with the application of said Two hundred and twelve thousand and sixty-six and 16/100 ($212,066.16) Dollars, liquidated said loan of Two hundred and fifty-one thousand four hundred and fourteen and 99/100 ($251,414.99) Dollars. That included in the said sums so applied by said bank, was the sum of Nineteen thousand two hundred and ninety-four ($19,294) Dollars collected by said bank through the New York Clearing House by reason of three checks, one for Three thousand ($3,000) Dollars, drawn by Irving Bank-Columbia Trust Company, the second for Fifteen thousand ($15,000) Dollars, drawn by Goldman, Sachs & Company and the third for One thousand two hundred and ninety-four ($1,294) Dollars drawn by the National City 32 33

34 Bank of New York respectively, deposited by said K N & K with said bank after delivery of said checks by said petitioners to said K N & K as aforesaid.

NINETEENTH.—That thereafter and on July 12th, 1923, and subsequent to liquidation of said loan of Two hundred and fifty-one thousand four hundred and fourteen and 99/100 ($25,414.99) Dollars, aforesaid, the National Bank delivered to said Receiver the following unsold securities which it had
35 held as said security for said loan, to wit:

STOCKS

100 shares Manhattan Railway Company, guaranteed.
550 shares Central Aguirre Sugar Company of Porto Rico.
500 shares Mexican Seaboard Oil Company, Voting Trust Certificates.
500 shares Southern Pacific.
100 Shares Reading Company.
1500 shares Transcontinental Oil Company.
36 200 shares National Cloak & Suit Company common.
1200 shares Ray Consolidated Copper Company.
100 shares Underwood Typewriter Company common.
460 shares Fajardo Sugar Company of Porto Rico common.
200 shares Northern Pacific Railway.
400 shares Tennessee Copper & Chemical Corporation.
200 shares Mexican Cotton Oil Company preferred.
50 shares U. S. Steel Corporation.
100 shares Hudson Motor Company.

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BONDS

$40,000 Erie Railroad 10 year gold 4% Series A due April 1953.

$16,000 Rio de Janeiro 25 year 8% External Loan Sinking Gold Bonds due April 1947.

$10,000 Rio de Janeiro City 25 year 8% Sinking Fund Bonds due Oct. 1946.

$10,000 Chicago, Milwaukee & St. Paul General & Refunding 4½% Series A Bonds due 2014.

$8,000 St. Louis-San Francisco Railway Co. Income A 6% Bonds due 1960.

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$5,000 Chesapeake & Ohio Convertible Secured 5% Bonds due April, 1946.

TWENTIETH.—That heretofore and on said 12th day of July, 1923, and before the commencement of this proceeding, said Middleton S. Borland, individually and as said Receiver wrongfully, and unlawfully converted and misappropriated the proceeds of said three checks, to wit: the sum of Nineteen thousand two hundred and ninety-four and 00/100 ($19,294) Dollars as aforesaid, thereby damaging petitioners herein in said sum with interest thereon from the said day of conversion and mis- 39
appropriation.

TWENTY-FIRST.—That the said sum of Nineteen thousand two hundred and ninety-four ($19,294) Dollars collected by the National Bank as aforesaid, which said sum said National Bank and said Receiver wrongfully and unlawfully misappropriated, converted and applied to the liquidation of said loan from said bank to said K. N. & K. as aforesaid, was and is the property of petitioners and petitioners are entitled to immediate possession thereof by reason of the facts hereinbefore alleged.

40

TWENTY-SECOND.—That petitioners herein are expressly reserving all rights that they had, now have or may hereafter have against said National Bank by reason of the application of the proceeds of said three checks to the liquidation of the said loan from said National Bank to said K. N. & K., as heretofore more particularly described in this petition, and said petitioners, further reserve the right to collect from said National Bank all or any part of the proceeds of said three checks remaining uncollected from said Receiver, as a result
41 of this proceeding or otherwise.

TWENTY-THIRD.—That a demand for the payment of the said sum of Nineteen thousand two hundred and ninety-four ($19,294) Dollars has been duly made upon said Middleton S. Borland, but said Middleton S. Borland has failed and refused and continues to refuse to pay and deliver said sum or any part thereof to petitioners.

WHEREFORE your petitioners pray that said Middleton S. Borland, individually and as said Receiver be directed:

42 1. To pay to petitioners herein the sum of Nineteen thousand two hundred and ninety-four ($19,294) Dollars, with interest thereon from July 21, 1923.

2. For such other and further relief as the court may deem fit to grant in the premises, besides the costs and disbursements of this proceeding.

ALEXANDER LATZKO,
WILLIAM LATZKO,
CHARLES LATZKO,
SAMUEL POPPER,
EMIL HOCHSTEIN,
By BRODEK & RAPHAEL,
Attorneys-in-fact.

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State of New York,
City of New York,
County of New York, } ss.:

Charles A. Brodek, being duly sworn, deposes and says: That he is a member of the firm of Brodek & Raphael, attorneys-in-fact for petitioners herein; that he has read and knows the contents of the foregoing petition; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

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Deponent further says that the reason why this verification is not made by any of the petitioners and is made by him, is that the petitioners are alien residents and citizens of Budapest, Hungary, and none of them is within the United States; the sources of deponent's information and the grounds of his belief as to all matters not stated in said complaint upon knowledge, are correspondence from petitioners, written documents relating to the subject matter of this petition in possession of deponent and statements by the agents and representatives of the Receiver.

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CHARLES A. BRODEK.

Sworn to before me this
24th day of January, 1924.

E. H. ROSENSTOCK,
Notary Public,
N. Y. County.

46 **Trustee's Answer.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, Alleged Bankrupts.	In Bankruptcy. No. 34,996.

47

To the Honorable Judges of the United States District Court for the Southern District of New York:

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The answer of Middleton S. Borland as receiver herein to the petition of Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Rochstein, doing business under the firm name and style of N. Latzko & A. Popper, respectively shows:

FIRST.—He denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs eleventh, fourteenth, and fifteenth of the petition.

SECOND.—He denies each and every allegation contained in paragraphs thirteenth, seventeenth, eighteenth (except the allegation "that on said date, said Receiver delivered to said bank his check for eighteen thousand eight hundred and fifty-one and 83/100 dollars, $18,851.83, in part payment of said loan, which payment together with the application of said two hundred and twelve thousand and sixty-two and 16/100 dollars, $212,066.16, liquidated said loan of two thousand and fifty-one thousand four hundred and fourteen and 99/100 dollars, $251,414.99"), twentieth and twenty-first of the petition.

THIRD.—The record of Knauth, Nachod & Kuhne's balance, deposits, withdrawals and final balance with the American Exchange National Bank for June 14th and 15th, 1923, is as follows:

1923	Balance at Opening of Business	Deposits	Withdrawals	Balan at Clo of Busin
June 14	$46,313.00	221,300.26	221,686.71	45,92
June 15	45,926.55	528,010.39	497,814.73	76,12

The balance of two hundred twelve thousand sixty-six and 66/100 dollars ($212,066.16) remaining with the American Exchange National Bank at the close of business on June 15, 1923, differs from the figure of seventy-six thousand one hundred twenty-two and 21/100 dollars ($76,122.21) as above set forth, due to the fact that some of the "withdrawals" entered on Knauth, Nachod & Kuhne's records were in the form of checks on the American Exchange National Bank which were not

52 honored and some of the "deposits" include checks to the order of Knauth, Nachod & Kuhne upon which payment was stopped.

FOURTH.—In the course of the liquidation of its loan to Knauth, Nachod & Kuhne the American Exchange National Bank sold the following securities pledged with it. (Those bearing no remarks were owned by customers.)

New York Central 6's 1935—$3,000.00 (Firm Owned.)

53 100 Shares Fajardo Sugar (Joint Account.)

500 Shares Mexican Seaboard Voting Trust Certificates (Firm Owned and Joint Account/30.)

The bank returned to the Receiver the following securities:

Chesapeake & Ohio 5's....	$ 5,000.00	
Chicago, Milwaukee & St. Paul 4½'s	10,000.00	
Erie Conv. 4's	40,000.00	
Rio de Janeiro 8's 1946 ...	10,000.00	
54 Rio de Janeiro 8's 1947 ..	16,000.00	
St. Louis & San Francisco 6's 1960	8,000.00	
American Cotton Oil	200	
Central Aguirre Sugar	550	
Fajardo Sugar	460	(Joint A/C except 50)
Hudson Motors	100	
Manhattan Railway Guar. Ctfs.	100	
Mexican Seaboard V. T. Ctfs.	500	(Firm owned & Joint A/C)

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National Cloak & Suit Co., Common	200	
Northern Pacific	200	
Ray Cons. Copper	1,200	
Reading	100	
Southern Pacific	500	
Tennessee Copper & Chemical	400	
Transcontinental Oil	1,500	
Underwood Typewriter	100	(Firm owned)
United States Steel	50	

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WHEREFORE, the Receiver prays that the petition herein be denied, without prejudice to the petitioners' rights to refile their petition in an Omnibus proceeding to be started herein.

JAMES N. ROSENBERG,
Attorney for the Receiver,
74 Broadway,
Borough of Manhattan,
City of New York.

State of New York,
County of New York, } ss.:

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Middleton S. Borland, being duly sworn, deposes and says, that he is the Receiver herein; that he has read the foregoing answer and knows the contents thereof and that the same are true to the best of his knowledge, information and belief.

MIDDLETON S. BORLAND.

Sworn to before me this
day of February, 1924.

ANNA T. MULVANEY,
Notary Public.
Kings Co. Clerk's No. 442, Reg. No. 5136.
Cft. filed in N.Y. Co. Clks. No. 373, Reg. No. 5310.
Commission expires March 30, 1925.

58 **Proceedings Before Special Master.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Bankruptcy.

In the Matter
of
KNAUTH, NACHOD & KUHNE,
59 Bankrupt.

Before—ROBERT P. STEPHENSON, Esq.,
Special Master.

32 Broadway, New York City,
August 19, 1924, at 2 p. m.

Hearing on reclamation of Latzko & Popper, proceeded pursuant to notice.

APPEARANCES:

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Messrs. ROSENBERG & BALL, Attorneys for Trustee, by George G. Ernst, Esq., Ralph F. Colin, Esq., of Counsel.

Messrs. BRODEK & RAPHAEL, Attorneys for Claimant, by C. A. Brodek, Esq., B. M. Komar, Esq., of counsel.

Hearing adjourned, by consent, to August 20, 1924, at 2 p. m.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Bankruptcy.

In the Matter
of
KNAUTH, NACHOD & KUHNE,
Bankrupt.

62

Before—ROBERT P. STEPHENSON, Esq.,
Special Master.

32 Broadway, New York City,
August 20, 1924, at 2 p. m.

Hearing on Reclamation of Latzko & Popper proceeded pursuant to adjournment.

APPEARANCES:

Messrs. ROSENBERG & BALL, Attorneys for Trustee, by George G. Ernst, Esq., Ralph F. Colin, Esq., of Counsel. 63

Messrs. BRODEK & RAPHAEL, Attorneys for Claimant, by C. A. Brodek, Esq., B. M. Komar, Esq., of Counsel.

Mr. Ernst: With respect to the claim of Latzko & Popper, the following is stipulated:

(1) The petition and the Receiver's answer as filed shall be deemed the pleadings in this proceeding except as hereinafter specified.

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(2) Paragraph Fourth of the petition shall be deemed denied except that the Receiver, and or the Trustee, admits "that at all times hereinafter mentioned and prior to the appointment of said Receiver, Petitioners maintained a current checking account with K. N. & K. that your petitioners did not draw upon said K. N. & K. against said account as aforesaid before the collection by said K. N. & K. of the moneys due upon such evidences of debt as were deposited by the petitioners herein to their account with said K. N. & K."

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(3) It is agreed that throughout the petition the reference to "the day said petition in bankruptcy was filed against said K. N. & K.," or any similar allegation, shall mean only "June 15, 1923" (this refers particularly to paragraphs Eighth, Ninth, Tenth, Eleventh and Thirteenth).

(4) It is agreed that wherever in the petition reference is made to a deposit by K. N. & K. with the American Exchange Bank "for collection" or "to be collected" or such similar phrase, the meaning shall be a deposit by K. N. & K. in its current
66 checking account with the bank in the ordinary course of business. (This refers particularly to paragraphs Eight, Nine, Ten, Eleven and Thirteen.)

(3) It is agreed that wherever in the petition reference is made to a deposit by or for the account of the petitioners with K. N. & K. "for collection" or "to be collected," such allegation shall be deemed denied by the Trustee, and or the Receiver. (This refers particularly to paragraphs Eight, Nine, Ten, Eleven and Thirteen.)

(6) The denial of the allegations contained in Paragraph Eleven of the petition, subject to the

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provisions of this stipulation, is to be deemed withdrawn.

(Then followed oral argument.)

Mr. Brodek: At this time, I wish to introduce into evidence the three checks referred to in the argument, and it is understood that the endorsements form part of the exhibit.

(Received in evidence and marked Claimant's Exhibit No. 1, August 20, 1924.)

Mr. Brodek: I also offer in evidence the letter of Goldman, Sachs & Co., in which the $15,000 check was sent to K. N. & K. 68

(Received in evidence and marked Claimant's Exhibit No. 2, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the Receiver to the American Exchange National Bank dated June 16, 1923.

Mr. Colin: That is admitted, subject to correction.

(Received in evidence and marked Claimant's Exhibit No. 3, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the Receiver to the same bank, dated June 22, 1923.

(Received in evidence and marked Claimant's 69
Exhibit No. 4, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the Receiver to the same bank, dated June 26, 1923.

(Received in evidence and marked Claimant's Exhibit No. 5, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the Receiver to the same bank, dated July 12, 1923.

(Received in evidence and marked Claimant's Exhibit No. 6, August 20, 1924.)

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Mr. Brodek: I offer in evidence a letter from the bank, by its assistant cashier, to the Receiver, dated June 25, 1923.

(Received in evidence and marked Claimant's Exhibit No. 7, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the bank, through its auditor, to the Receiver, dated June 25, 1923.

(Receiver in evidence and marked Claimant's Exhibit No. 8, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from
71 the bank to the Receiver, dated June 26, 1923.

(Received in evidence and marked Claimant's Exhibit No. 9, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the bank to the Receiver, dated June 27, 1923.

(Received in evidence and marked Claimant's Exhibit No. 10, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the bank to the Receiver, dated June 28, 1923.

(Received in evidence and marked Claimant's Exhibit No. 11, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from
72 the bank to the Receiver, dated July 12, 1923.

(Received in evidence and marked Claimant's Exhibit No. 12, August 20, 1924.)

Mr. Brodek: There is a further stipulation which has just been suggested, as to which I have not quite made up my mind because it injects a fresh element into the situation.

Mr. Colin: Mr. Brodek contends that the mere crediting of the account without permitting the depositor to draw against it does not affect the situation. All I would like from him is a stipulation covering the entries in the books. I have just some from the American Exchange Bank and I know, as

73

a fact, that credit was given on the 15th. I also know, as a fact, that on K. N. & K.'s books credit was given to Latzko & Popper on the 15th, and I would like him to stipulate those facts subject to correction.

Mr. Brodek: It is stipulated that all items deposited with the American Exchange Bank of K. N. & K. on June 15th were placed on the credit side of K. N. & K.'s account on the books of the bank as of that date, and the accounts thus placed on the credit side of the account of K. N. & K. on that day included the two checks deposited in favor 74 of Latzko & Popper on that day, and that some of the items thus placed on the credit side on that day were subsequently stopped and charged back against K. N. & K. by the bank.

Mr. Colin: It is so agreed, the foregoing stipulation and the following one being subject to correction on the facts.

It is further stipulated by and between the parties hereto that Latzko & Popper, the petitioners herein, were credited, on the books of K. N. & K., as of June 15, 1923, with the two checks deposited for their account in the respective amounts of $15,000 and $1,294. 75

Mr. Brodek: That is so agreed.

Hearing Closed.

(Briefs to be submitted by September 3, 1924.)

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Report of Special Master.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, doing business as copartners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankrutcy #34996. Report #6 of Special Master.

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To the Honorable Judges of the District Court of the United States for the Southern District of New York:

By order of this court dated April 23, 1924, this case was referred to me as Special Master, to hear the allegations, proofs and testimony of all persons filing reclamation petitions, and to report to the court my opinion thereon.

79

RECLAMATION OF N. LATZKO and A. POPPER.

The petition is for an order directing the trustee to turn over to the petitioner the sum of $19,294, with interest from July 12, 1923, and for further relief.

The claim arises out of three checks delivered to the Receiver, as follows:

A.—Cashier's check of the Irving Bank-Columbia Trust Company, dated June 14, 1923, for $3,000. 80

B.—Cashier's check of the National City Bank of New York, dated June 15, 1923, for $1,294.

C.—Check of Goldman, Sachs & Co., dated June 15, 1923, drawn on the Bank of America for $15,000.

STATEMENT OF FACTS.

Petitioner is a co-partnership engaged in business as international bankers in the City of Budapest, Hungary. They maintained a current checking account with Knauth, Nachod & Kuhne, and did not 81 draw against said account before the collection by Knauth, Nachod & Kuhne of the monies due upon such evidences of debt as were deposited by the petitioner to their account with Knauth, Nachod & Kuhne.

A. On June 14, 1923, the petitioner caused the Irving Bank-Columbia Trust Company to deliver to Knauth, Nachod & Kuhne a check which reads as follows:

82 "TREASURER'S CHECK.

6 New York, 6/14/23. No. K10217

IRVING BANK-COLUMBIA TRUST COMPANY
Woolworth Building

PAY TO THE ORDER OF
Knauth, Nachod & Kuhne, New York City,
$3,000.00 Three thousand and 00/100—Not Over
Three Thousand ($3,000.) Dollars
Through New York Clearing House

83 Countersigned:

F. J. MORAN. G. W. BUGEL,
Treasurer."

and Knauth, Nachod & Kuhne gave the Irving Bank-Columbia Trust Company a receipt which reads as follows:

"To be signed and returned to
IRVING BANK-COLUMBIA TRUST COMPANY
NEW YORK, N. Y.

FOREIGN PAYING AND RECEIVING DEPT.

84 AMSTERDAMSCHE BANK,
AMSTERDAM, HOLLAND.

New York, 6/14/23.

Received from the

IRVING BANK-COLUMBIA TRUST COMPANY, $3,000.
Three Thousand and 00/100.....Dollars
By order of POSTER UNGARISCHE COMMERCIAL BANK, BUDAPEST, for account of N. LATZKO AND A. POPPER, BUDAPEST.

KNAUTH, NACHOD & KUHNE,
120 Broadway, N. Y.

PAYING & RECEIVING FOREIGN
J. ROSENBLUM
Signed by

STAMP
FOREIGN
Jun 29 1923
DEPARTMENT

85

STAMP
RECEIVED PAYMENT
June 14, 1923

KNAUTH, NACHOD & KUHNE,
New York

as per Cable of 6/13/23

DUPLICATE Per....."

(Paragraph 8th of Petition, Claimant's Exhibit I).

On that day Knauth, Nachod & Kuhne credited 86
the petitioner with the amount of this check, and on the same day deposited the same with the American Exchange National Bank, indorsing the check as follows:

"Pay to AMERICAN EXCHANGE
NATIONAL BANK
Or Order
Jun 14, 1923
KNAUTH, NACHOD & KUHNE,
NEW YORK, N. Y. (21)
1-548 1-548"

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and the American Exchange National Bank on that same day credited Knauth, Nachod & Kuhne with the amount of that check. The check was collected by the American Exchange National Bank through the New York Clearing House on June 15, 1923, during banking hours.

B. On June 15, 1923, the petitioner caused the National City Bank of New York to deliver to Knauth, Nachod & Kuhne a check which reads as follows:

88

"No. F. T. 261365 NEW YORK, June 15, 1923.
CASHIER'S CHECK
THE NATIONAL CITY BANK OF NEW YORK
PAY TO THE ORDER OF
KNAUTH, NACHOD & KUHNE, New York..$1294.00
FAVOR N. LATZKO & A. POPPER, Budapest.....
One Thousand Two Hundred Ninety-Four and
00/100 ..... Dollars
Payable only through New York
Clearing House
N. G. LENFESTEY, Cashier.
89 J. W. ALLALE, Asst. Cashier."

Knauth, Nachod & Kuhne, on the same day, credited the petitioner with the amount of this check. On the same day, June 15, 1923, Knauth, Nachod & Kuhne deposited this check with the American Exchange National Bank after putting on the following indorsement:

"Pay to AMERICAN EXCHANGE
NATIONAL BANK
Or Order
Jun 15, 1923
90 KNAUTH, NACHOD & KUHNE
NEW YORK, N. Y. (21)
1-548 1-548"

and the American Exchange National Bank, on that same day, credited Knauth, Nachod & Kuhne with the amount of this check. The American Exchange National Bank received payment of this check through the New York Clearing House on June 16, 1923, during banking hours.

On June 15, 1923, the petitioner caused Goldman, Sachs & Co. to deliver to Knauth, Nachod & Kuhne a check which reads as follows:

91

"GOLDMAN, SACHS & CO.
No. 69619 NEW YORK, Jun 15, 1923
THE BANK OF AMERICA
PAY TO THE ORDER OF
KNAUTH, NACHOD & KUHNE.....$15,000.
.....Fifteen Thousand Dollars.....
Passed
FWY J. M. HUMPHREY"

and with this check, delivered to Knauth, Nachod & Kuhne a letter reading as follows:

92

"New York, June 15, 1923.

Knauth, Nachod & Kuhne,
New York.

We hand you herewith our check for #Fifteen Thousand#.....Dollars for account of Latzkopper, Budapest, by order of Julius Baer & Co., Zurich, as per cable, June 15, from same.

Please sign the attached receipts and return to bearer.

$15,000.—

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GOLDMAN, SACHS & CO."

(Paragraph 9th of petition, Claimant's Exhibits I and II.)

Knauth, Nachod & Kuhne, on the same day, credited the petitioner with the amount of this check. On the same day, June 15, 1923, Knauth, Nachod & Kuhne deposited this check with the American Exchange National Bank, after putting on the following indorsement:

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"Pay to AMERICAN EXCHANGE
NATIONAL BANK
Or Order
Jun 15, 1923
KNAUTH, NACHOD & KUHNE
NEW YORK, N. Y. (21)
1-548 1-548"

And the American Exchange National Bank on that day credited Knauth, Nachod & Kuhne with the amount of this check. The American Exchange
95 National Bank received payment of this check through the New York Clearing House on June 16, 1923, during banking hours.

After banking hours on June 15, 1923, a petition in involuntary bankruptcy was presented to Judge Knox and an order appointing Middleton S. Borland, Receiver, was signed by him. Both of these papers were filed with the Clerk of the United States District Court on the morning of June 16, 1923, before banking hours.

On June 16, 1923, Middleton S. Borland, the Receiver, wrote the American Exchange National Bank, stating that he had been appointed Receiver,
96 and directing the Bank not to pay any checks drawn against the account of Knauth, Nachod & Kuhne, and to hold the funds on deposit at the opening of business on June 16th for his account, and until further notice from him. (Claimant's Exhibit III.) Later, the Receiver approved of the sales by the American Exchange National Bank of certain securities, which were held by the American Exchange National Bank as collateral for loan made by it to Knauth, Nachod & Kuhne, and the proceeds of said sale were credited on account of such loan.

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On July 12, 1923, the Receiver gave his check for $18,851.83 to the American Exchange National Bank in liquidation of a call loan of April 22, 1923, for $250,000, and the American Exchange National Bank returned to the Receiver the unsold securities, and set off in part payment of the $250,000 loan the balance of the account then standing to the credit of Knauth, Nachod & Kuhne. In this balance was included the proceeds of the checks above referred to.

The foregoing facts are taken from the allegations of the petition which have not been denied by 98
the Trustee, and from the stipulations made by the parties at the hearing and from the exhibits introduced in evidence.

There was no special agreement between the petitioner and Knauth, Nachod & Kuhne, and therefore checks deposited by the petitioner with Knauth, Nachod & Kuhne became their property, and the petitioner became an immediate creditor for the amount deposited, even before the same was collected. (*Burton* v. *U. S.*, 196 U. S., 283; re *Jarmulowsky*, 249 Fed., 319.) But in this case the check of the National City Bank for $1,294 had on it 99
these words

> "FAVOR N. LATZKO & A. POPPER, Budapest"

and the check for $15,000 from Goldman, Sachs & Co. was accompanied by a letter which stated that it was

> "For account of Latzkopper, Budapest, By order of JULIUS BAER & CO., Zurich,"

and the check for $3,000 received from the Irving Bank-Columbia Trust Company was received by Knauth, Nachod & Kuhne according to their receipt

100 "For account of N. Latzko and A. Popper, Budapest."

These words on the checks or accompanying them as part of the transaction indicate a special agreement with the drawers of the checks, under which Knauth, Nachod & Kuhne undertook, as agent, to collect these checks for Latzko and Popper, and title to the same would not pass to Knauth, Nachod & Kuhne.

101 (*White* v. *National Bank*, 102 U. S., 658;
Smith v. *Motley*, 150 Fed., 266;
Commercial Bank v. *Armstrong*, 148 U. S., 50;
Evansville Bank v. *German-American Bank*, 155 U. S., 556.)

I should have no doubt that the property in the above checks and the proceeds thereof belonged to Latzko and Popper, were it not for the allegation in the petition that Latzko and Popper caused the banks and Golden, Sachs & Co. to deliver these checks to Knauth, Nachod & Kuhne. I must con-
102 clude from this allegation of the petition that the banks delivering these checks to Knauth, Nachod & Kuhne and Goldman, Sachs & Co. were acting as agents of the petitioner, and the delivery of the checks to Knauth, Nachod & Kuhne was the same as if they had been delivered by Latzko and Popper themselves. I do not believe that *White* v. *National Bank* (supra) applies where a person deposits a check in a bank where he has an account against which he draws. The evidence shows that Latzko and Popper did not, in fact, draw against their account with Knauth, Nachod & Kuhne until the items deposited were actually collected, but the

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evidence does not show that they had no *right* to draw before that time, and the burden is upon the petitioner to prove a special agreement showing that it had no *right* to draw before collection. This deposit of checks, accompanied by a notice that they are for the account of the depositor or in favor of the depositor, does not prove a special agreement, as would be the case, if the depositor had indorsed on the checks "For collection"—(*Jarmulowsky*, supra). In *White* v. *National Bank* (supra), it was held that where A, the payee of a check, indorsed it to B "for account of A," B did not get title to 104
the check, but was merely the agent to collect it for A's benefit. In the *White* case, however, B was not a bank in which A had an account against which he could draw. I cannot believe that one who deposits a check in his own bank, in which he has an account, with a notation that it is for his (the depositor's) account, means that the title of the check is to remain in the depositor until the bank collect it. In fact, it seems that a deposit for the account of a person indicates an intention to pass title to the bank, and to receive immediate credit on the depositor's account. It is not, in my opinion, the equivalent of a deposit for collection. 105

I therefore recommend an order dismissing the petition with costs and disbursements against the petitioner.

I return herewith the testimony before me, with the exception of the exhibits which are retained by the parties.

Dated, New York, September 24th, 1924.

Respectfully submitted,

ROBERT P. STEPHENSON,
Special Master.

106 **Order Appealed From.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, et al., trading as KNAUTH, NACHOD & KUHNE, etc., Bankrupts.	In Bankruptcy No. 34996.
In the Matter of Reclamation Claim of LATZKO & POPPER.	Re Special Master's Report No. 6.

107

This matter having duly come on to be heard on January 21, 1925, upon motion of Rosenberg & Ball, attorneys for the Trustee herein, for an order confirming report No. 6 of the Special Master herein, NOW, upon reading and filing said report of the Special Master and the papers referred to therein and thereto annexed, and upon all of the proceedings had herein, it is, after due consideration, on motion of Rosenberg & Ball, attorneys for the Trustee herein,

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ORDERED that the said report of the Special Master be and the same hereby is in all respects confirmed, and the reclamation claim of Latzko & Popper be and the same hereby is dismissed; and it is

109

FURTHER ORDERED that the Trustee be and he hereby is authorized and directed to pay Robert P. Stephenson, as Compensation for his services as Special Master herein, $100.00, and that the Trustee recover from claimant herein, as costs and disbursements, the said $100.00, together with stenographer's fees of $6.30, and in addition thereto a docket fee of $20, amounting in all to $126.30, and have judgment and execution therefor; and it is

FURTHER ORDERED that, for the purpose of effecting collection of said costs and disbursements, 110
the Trustee be, and he hereby is, authorized to offset said amount against any dividend or dividends which may be declared herein in favor of said claimant.

Dated, New York, February 20, 1925.

A. N. HAND,
U. S. D. J.

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112 **Opinion of District Court.**

No. 1024.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
KNAUTH, NACHOD & KUHNE,
Bankrupts.

B. No. 34996.

113

Report No. 6 of Special Master—Reclamation of N. Latzko and A. Popper.

BRODEK & RAPHAEL, Solicitors for Claimants, Charles A. Brodek and Borris M. Komar, Counsel.

ROSENBERG & BALL, Solicitors for Trustee, George G. Ernst and Ralph F. Colin, Counsel.

114 AUGUSTUS N. HAND, District Judge:

The claimants had a general checking account with the bankrupts. They contend that three checks drawn by New York banks which they caused said banks to deliver to the bankrupts prior to the filing of the petition in bankruptcy were deposited with the bankrupts for collection. These checks were credited by the bankrupts to claimants' account when received but the first was collected the day the petition was filed—though earlier in the day, and the other two were collected the day after the filing of the petition. Each check was

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drawn by a New York Bank to the order of the bankrupts. In the case of the first check the bankrupts gave the drawer a receipt reciting that the deposit was "for account of N. Latzko and A. Popper, Budapest."

The second check through drawn to the order of the bankrupts bore on its face the words "Favor N. Latzko and A. Popper, Budapest."

The third check was drawn to the bankrupts' order, had no possible limitation on its face, but was accompanied by a letter from the drawer stating it was "for account Latzkopper, Budapest." 116

The proceeds of the first check clearly became part of the assets of the bankrupts prior to the hour when the petition was filed. I can see no reason for invoking the rule that the law will take no account of the fractions of a day to defeat the bankrupts' title. It would to as tenable to hold that two lis pendens filed at different hours on the same day imposed an identical lien. The claimant cannot prevail as to the first check and the master's report as to it should be confirmed.

In respect to the last two checks, it is true that "for account of" ordinarily means for collection and that an agency may be indicated by a letter of instruction or by notation as well as by a restrictive endorsement. *Boone County National Bank* v. *Latimer*, 67 Fed., 27. Nor does a credit by the bank receiving the check without the acquiescence of the customer, nor an occasional permission to make drafts on the account which would naturally be met from the proceeds of the check when collected, alter an understanding that the check is deposited for collection only. *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566; *Matter of Jarmulowsky*, 249 Fed., 320. But here 117

118 the deposit was in the claimants' ordinary checking account. Instructions to place it to such account emanating from them, and due to the necessity of indicating for whom the check was received, create a different situation from that in *White* v. *Miners National Bank*, 102 U. S., 658, where the deposit was in a bank where there was an endorsement for account of A to the order of a bank in which A had no checking account.

In spite of the importance of giving words in commercial use a uniform effect so far as may be
119 just and reasonable, I think the effect sought to be given here to the words "for account of" is contrary to the natural meaning of the words under the circumstances. The case seems to fall within the reasoning of *Burton* v. *U. S.*, 196 U. S., 283, and the rule laid down in *Matter of Jarmulowsky*, 249 Fed., at page 321. Judge Hough there said:

> "In the absence of any special agreement between these depositors and their bank, the title to the checks would have passed to the bank, and the bank become merely a debtor to
> 120 the depositor for the amount entered in the passbook * * *. Whether there was any other or special agreement made is a question of fact."

While the situation is not free from doubt. I am of the opinion that the Master's Report as to the Latzko and Popper claim should be confirmed.

A. N. H.,
D. J.

February 17, 1925.

Petition for Appeal. 121

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, 122

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as copartners doing business under the firm name and style of H. LATZKO and A. POPPER, 123

Petitioners-Appellants.

To the Honorable District Judges of the United States District Court for the Southern District of New York:

The above named petitioners conceiving themselves aggrieved by the Final Order and Decree en-

tered on the 20th day of February, 1925, in the above entitled matter denying petition of N. Latzko and A. Popper to reclaim from the Trustee the proceeds of three (3) certain checks more particularly described in said petition and totalling the sum of $19,294, do hereby petition for an appeal from said order and decree and each and every part thereof to the United States Circuit Court of Appeals for the Second Circuit and pray that their appeal may be allowed and a citation granted directed to the Trustee, commanding him to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records and proceedings in said matter, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

BRODEK & RAPHAEL,
Solicitors for Petitioners,
Office & P. O. Address,
67 Wall Street,
Borough of Manhattan,
City of New York.

Appeal is hereby allowed.

AUGUSTUS N. HAND,
U. S. D. J.

Dated, February 28th, 1925.

Assignment of Errors. 127

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, 128

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as copartners doing business under the firm name and style of H. LATZKO and A. POPPER, 129

Petitioners-Appellants.

The above named petitioners make in connection with their petition of appeal the following assignment of errors, and say that the final order entered herein on the 20th day of February, 1925, is erroneous and against the just rights of said petitioners for the following reasons:

130 *Assignment of Errors.*

1. The District Court erred in holding that the title to the proceeds of a certain check for $3,000 drawn by the Irving Bank-Columbia Trust Company and collected by said bankrupts on June 15th, 1923, was on the day the petition in bankruptcy herein was filed in said bankrupts and not in said petitioners.

2. The District Court erred in holding that the title to the proceeds of a certain check for $15,000 drawn by Goldman, Sachs & Company and collected
131 by the Receiver herein on June 16th, 1923, was on the day the petition in bankruptcy herein was filed in said bankrupts and not in said petitioners.

3. The District Court erred in holding that the title to the proceeds of a certain check for $1,294 drawn by the National City Bank of New York and collected by the Receiver herein on June 16th, 1923, was on the day the petition in bankruptcy herein was filed in said bankrupts and not in said petitioners.

4. The District Court erred in holding that the
132 deposit of checks by a depositor to his current account with a Bank accompanied by instructions that said checks are deposited "for account of" or "in favor of" the depositor was not equivalent in law to a deposit of said checks for collection.

5. The District Court erred in holding that the instructions showing that checks were deposited by a depositor to his general account with a bank "for account of" or "in favor of" of the depositor were ambiguous and could be explained by extrinsic evidence.

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6. The District Court erred in holding that the deposit of checks by a depositor to his current account with a bank accompanied by instructions that said checks are deposited "for account of" or "in favor of" the depositor did not constitute a special agreement between the depositor and the bank that said deposit was for collection.

7. The District Court erred in holding that in the absence of special agreement between a depositor and a bank wherein the depositor has a general checking account the established course of dealings 134
between said depositor and the bank should be disregarded in ascertaining whether the depositor had or had not a right to draw as against his deposit prior to the collection by the bank of the checks deposited by him.

8. The District Court erred in holding that in the absence of special agreement between a depositor and a bank wherein depositor has a general checking account the established course of dealings between said depositor and the bank showing that said depositor never drew against his deposits of checks until the same were collected by the bank, 135
does not raise the presumption that the depositor had no right to draw against his deposits of checks before the collection of same by the bank.

9. The District Court erred in holding that where question of the possession of assets by the bankrupt is concerned, fractions of the day on which the petition in bankruptcy is filed should be considered by the court.

WHEREFORE said petitioners pray that said final order be reversed with costs and that said

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District Court be directed to grant the petition of reclamation herein and to order the Trustee of said bankrupts to pay to petitioners herein the sum of $19,294 with interest thereon from July 12th, 1923, and for such other and further relief as may be just and proper.

BRODEK & RAPHAEL,
Solicitors for Petitioners,
Office & P. O. Address,
67 Wall Street,
137 Borough of Manhattan,
New York City.

Citation.

By the Honorable John C. Knox, one of the United State District Judges for the Southern District of New York, in the Second Circuit. To Middleton S. Borland, Trustee in Bankruptcy, and to Oscar L. Gubelman, James F. Shaw, Rollin C. Newton, Herbert B. Smithers,
138 John R. Hall, Mary W. Knauth and Theodore W. Knauth, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named on the 30th day of March, 1925, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hoch-

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stein, as co-partners doing business under the firm name and style of N. Latzko and A. Popper appellants and you are appellees to show cause, if any there be, why the order in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 2nd day of March, in the year of our Lord One thousand nine hundred and twenty-five, and of the Independence of the United States the One hundred and forty-ninth.

140

JOHN C. KNOX,
United States District Judge for the Southern District of New York, in the Second Circuit.

Stipulation re Appeal Bond.

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It is stipulated that the bond required by the order, allowing the appeal herein, was duly given, approved and filed, and that such bond and approval need not be printed.

Dated, New York, March 23, 1925.

BRODEK & RAPHAEL,
Solicitors for Petitioners-Appellants.

ROSENBERG & BALL,
Solicitors for Trustee-Appellee.

142 **Stipulation as to Record.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R.
143 HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as copartners doing business under the firm
144 name and style of N. LATZKO and A. POPPER,

Petitioners-Appellants.

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record in said District Court in the above entitled matter, as agreed upon by the parties.

Dated, New York, March 23, 1925.

BRODEK & RAPHAEL,
Solicitors for Petitioners-Appellants.

ROSENBERG & BALL,
Solicitors for Trustee-Appellee.

Clerk's Certificate. 145

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, 146

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as copartners doing business under the firm name and style of N. LATZKO and A. POPPER, 147

Petitioners-Appellants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the rec-

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ord of the said District Court in the above entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 31st day of ~~April~~ March in the year of our Lord one thousand nine hundred and twenty-five and of the Independence of the said United States the one hundred and forty-ninth.

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ALEXANDER GILCHRIST, JR.,
Clerk.

150

Petitioners' Exhibit No. 3. 151

June 16, 1923.

American Exchange National Bank,
128 Broadway,
N. Y. City.

Dear Sirs:

By an order made June 15, 1923, by the United States District Court, Southern District of New York (Hon. John C. Knox, U. S. District Judge), I have been appointed Receiver of the partnership 152
or firm, of Knauth, Nachod & Kuhne, and my bond in the sum of $50,000 has been approved this morning and duly filed in the Clerk's office of said Court.

You will please take notice that by the terms of the order of my appointment, copy of which will be forwarded to you as soon as the order has been printed, I am directed to take possession of all the property of every kind of the alleged Bankrupts, and that all persons, firms and corporations are directed forthwith to deliver to said Receiver all money and property of the Bankrupts now in their possession. 153

You will, please, therefore, not pay any checks drawn against the account of this firm which come into your Bank either by presentation direct or through the Clearing House and hold the funds which were on deposit at the opening of business on June 16th, for my account and until further notice from me.

Yours very truly,

M. S. BORLAND,
Receiver.

MSB/M

154 **Petitioners' Exhibit No. 4.**

June 22, 1923.

American Exchange National Bank,
128 Broadway,
City.

Dear Sirs:

Confirming conversation which our Mr. Newton had with your Mr. Haig, I herewith notify you my approval of the sale to Messrs. Farr & Co., of 100 shares Fajardo Sugar stock at 110 per share.

155 Kindly credit the proceeds on account of the loan of which this stock is part collateral, and oblige

Yours very truly,

M. S. BORLAND,
Receiver.

Petitioners' Exhibit No. 7.

AMERICAN EXCHANGE NATIONAL BANK

June 25, 1923.

156 Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
City.

Dear Sir:

We beg to advise that we are holding a Call Loan of Knauth, Nachod & Kuhne for $250,000 dated April 27, 1921, and we hereby make a demand for payment of same.

Yours very truly,

CLINKEN BROOMER,
Assistant Cashier.

Petitioners' Exhibit No. 8. 157

AMERICAN EXCHANGE NATIONAL BANK

June 25, 1923.

Receiver, Knauth, Nachod & Kuhne,
120 Broadway,
New York City.

Attention: Mr. S. RICHARDSON.

Dear Sir: 158

We are enclosing herewith our statement of the account of Knauth, Nachod & Kuhne, together with cancelled vouchers, which shows a balance due you of $212,127.86.

You are indebted to us for a loan of $250,000.

We sold on Saturday 100 shs Fajardo Sugar at 110. We understand that the proceeds of the above are to be placed to your account tomorrow, less commission charges and revenue stamps for $22.40.

Trusting that you will find this statement correct, we beg to remain

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Yours very truly,

CHARLES V. A. WALSH,
Auditor.

160 **Petitioners' Exhibit No. 5.**

June 26, 1923.

American Exchange National Bank,
128 Broadway,
N. Y. City.

Dear Sirs:

In accordance with conversation which Mr. Newton of this office had with your Mr. Haig, I herewith confirm my approval of the sale of 500 shares
161 Mexican Seaboard Voting Trust Certificate. $3,000 N. Y. Central 7s due 1935,
at the market, and will thank you to notify me when such sales have been made.

Kindly credit the proceeds on account of the loan of which the stock is part collateral, notifying me of the amount realized and oblige

Yours very truly,

M. S. BORLAND,
Receiver.

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162 **Petitioners' Exhibit No. 9.**

AMERICAN EXCHANGE NATIONAL BANK

June 26, 1923.

Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
City.

Dear Sir:

Referring to your letter of the 22nd, we have sold to Farr & Co., 100 shares Fajardo Sugar at

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110, netting $10,996, which amount we have applied in reduction of loan of Knauth, Nachod & Kuhne dated April 27, 1921, leaving balance due of $239,004.

We have charged the account of Knauth, Nachod & Kuhne $22.40 to cover transfer stamps on transfer of 560 shares of Fajardo Sugar stock to our nominee to make same negotiable.

Yours very truly,

W. J. CLINKENBROOMER,
Cashier.

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Petitioners' Exhibit No. 10.

AMERICAN EXCHANGE NATIONAL BANK

June 27, 1923.

Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
City.

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Dear Sir:

Referring to your letter of the 26th, we have sold $3,000 New York Central convertible 6% bonds of 1935 netting $3,146, as per statements enclosed ($1,000 at 104 and $2,000 at 104⅛). We have applied this amount in reduction of loan Knauth, Nachod & Kuhne, dated April 27, 1921, leaving balance due of $235,858.

We are today charging the account of Knauth, Nachod & Kuhne $40 to cover revenue stamps ac-

166 count transfer of 1000 shares Mexican Seaboard Oil Voting Trust certificate to the name of our nominee.

Yours very truly,

W. J. CLINKENBROOMER,
Cashier.

Petitioners' Exhibit No. 11.

167 AMERICAN EXCHANGE NATIONAL BANK

June 28, 1923.

Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
N. Y. City.

Dear Sir:

168 Referring to your letter of the 26th, we have sold 500 shares Mexican Seaboard Oil Voting Trust Certificates to net $6,355 (200 at 12¾, 300 at 13), as per statements enclosed. We have applied this amount in reduction of loan Knauth, Nachod & Kuhne dated April 27, 1921, leaving balance due of $229,503.

Yours very truly,

CLINKENBROOMER,
Assistant Cashier.

Petitioners' Exhibit No. 12. 169

AMERICAN EXCHANGE NATIONAL BANK
128 Broadway
New York

July 12, 1923.

Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
New York City.

Dear Sir: 170

We acknowledge receipt of your favor of the 12th inclosing check for $18,851.83.

In accordance with your instructions we are today charging the account of Knauth, Nachod & Kuhne $212,066.16 (balance of account) and applying same with the above mentioned check to retire loan of Knauth, Nachod & Kuhne April 17, 1921, which balance, $229,503 and interest to date $1,414.99 as per enclosed statement.

We have today handed your representative the balance of the securities held against the above loan. Letters covering sale of securities have already been forwarded to you. 171

Thanking you, we are

Yours very truly

CLINKENBROOMER,
Assistant Cashier.

172 **Petitioners' Exhibit No. 6.**

July 12, 1923.

American Exchange National Bank,
128 Broadway,
N. Y. City.

ATTENTION: Mr. W. G. CLINKENBROOMER

Dear Sir:

Enclosed herewith please find my check for
173 $18,851.83 in liquidation of Call Loan of April 22, 1923, for $250,000. Will you please deliver to bearer the following unsold securities:

SECURITIES UNSOLD.

STOCKS.

100 Shares Mhtn. Ry. Guar.
550 shares Cent. Ag. Sug.
500 Mex. Seaboard V. T. Ctf.
500 Southern Pacific
100 Reading
174 1500 T. C. Oil
200 Nat. Cl. & Suit
1200 Ray Copper
100 Underwood Type
460 Fajardo Sugar
200 North Pac.
400 Tenn. Copper & Chem.
200 Cot. Oil pfd.
50 Steel Com.
100 Hudson Motor

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BONDS.

$40,000 Erie 4/53
16,000 Rio de Janeiro 8/47
10,000 Rio de Janeiro 8/46
10,000 St. Paul 4½/2014
8,000 Frisco Inc. 6/60
5,000 Ches. & Ohio 5/46

Yours very truly,

M. S. BORLAND,
As Receiver of Knauth, Nachod & Kuhne.

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Clerk's Certificate.

United States of America,
Southern District of New York, } ss.:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District District of New York, do hereby Certify that the Writings annexed to this Certificate have been compared by me with their originals on file and remaining of record in my office, that they are correct transcripts therefrom and of the whole of the said originals.

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IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court at the City of New York, in the Southern District of New York, this 17th day of March in the year of our Lord One Thousand Nine Hundred and Twenty-six, and of the Independence of the said United States the One Hundred and Fiftieth.

ALEX. GILCHRIST, JR.,
(Seal) Clerk.

178 **Stipulation re Exhibits.**

DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH
179 and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO
180 and A. POPPER,
Petitioners-Appellants,

MIDDLETON S. BORLAND,
Trustee-Appellee.

IT IS HEREBY STIPULATED between the parties to the above entitled action through their respective attorneys that the record of the above cause to be used on certiorari proceedings from, and the appeal to the United States Supreme Court shall include Petitioners' Exhibits 3, 4, 5, 6, 7, 8

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9, 10, 11, and 12, and the order of the above court dated February 2, 1926, pursuant to the provision of the Equity Rule No. 76.

Dated, New York, February 26th, 1926.

BRODEK & RAPHAEL,
Attorneys for Appellants.

ROSENBERG & BALL,
Attorneys for Appellee.

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184 **Opinion of Circuit Court.**

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

In the Matter
of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN
185 R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm
186 name and style of N. LATZKO and A. POPPER,
Petitioners-Appellants,

MIDDLETON S. BORLAND,
Trustee-Appellee.

Before—ROGERS, MANTON and HAND,
Circuit Judges.

BRODEK & RAPHAEL, for Petitioners-Appellants; Charles A. Brodek, Borris M. Komar, of Counsel.

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ROSENBERG & BALL, for Trustee-Appellee; George G. Ernst, Ralph F. Colin, of Counsel.

KELLOGG, EMERY, INNESS-BROWN & CUTHELL; Henry G. Hotchkiss, of Counsel.

Appearing as Amici Curiae.

This cause comes here from the United States District Court for the Southern District of New York.

The facts are stated in the opinion.

Rogers, Circuit Judge. This is an appeal from an order dismissing a reclamation claim of copart- 188
ners doing business as international bankers and maintaining a banking house in the City of Budapest, Hungary under the firm name of N. Latzko & A. Popper. And on appeals in such a proceeding this court reviews both findings of fact and conclusions of law.

On June 15, 1923, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York praying that the firm of Knauth, Nachod & Kuhne be adjudged bankrupt and they are hereinafter referred to as the bankrupts.

A temporary receiver was appointed and quali- 189
fied and the receivership was extended for each individual member of the copartnership, and the receiver entered into possession of the property of the alleged bankrupts.

The bankrupts were engaged in business as international bankers and maintained a banking house in the City of New York. They acted as the New York correspondents of the Budapest banking house of N. Latzko & A. Popper, the petitioners.

The nature of the dealings between the two banking houses involved the transmission of funds by

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the Budapest house to the New York house, or the delivery by the Budapest house to the New York house of evidences of debt which were collected by the latter and placed to the credit of the former, from which account payments were made from time to time by the New York house upon order or request of the Budapest house.

There was no express agreement that evidences of debt, so forwarded to the bankrupts, were to be credited upon their receipt and before collection as a deposit of cash. Neither was there an express
191 agreement that upon the receipt of such evidences of debt by the New York house the Budapest house should have the right to draw against the fund prior to its collection. But there was no agreement that the Budapest firm could not draw against such evidences of debt before their collection. They simply did not as a matter of fact do it. The allegations in the petition make this clear and are found in the margin.[1]

In the determination of the questions which are involved it is important to keep in mind the date on which the trustee of a bankrupt's estate be-
192 comes vested with the title to the estate.

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[1] "Fifth.—That petitioners had no agreement with said K. N. & K. (the bankrupts) to treat evidences of debt deposited with said K. N. & K. for collection or otherwise, as a deposit of cash, nor that an immediate credit should be given by said K. N. & K. to petitioners upon the receipt of such evidences of debt.

Sixth.—That petitioners did not treat evidences of debt deposited with said K. N. & K. for collection or otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K. N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K. N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K. N. & K."

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Section 70a of the Bankruptcy Act provides that "The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him * * *."

And Remington on Bankruptcy (3rd ed.), vol. 3, sec. 1191 states that the above section of the Bankruptcy Act vests all the property in the 194
trustee, which prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him.

In Everett v. Judson, 228 U. S., 474, 479, the court said:

> "We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the
> time of adjudication is that which the bank- 195
> rupt owned at the time of the filing of the petition."

And this doctrine is reasserted in White v. Stump, 266 U. S., 310, 313. In the case last cited, referring to the date when the petition is filed, the court said:

> "The bankrupt's right to control and dispose of the estate terminates as of that time, save only as to 'property which is exempt.'"

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The Petition for Reclamation in this case alleged that the involuntary petition in bankruptcy was filed on June 15, 1923, at 10:30 P. M. with the District Judge, and that on the same day the temporary receiver was appointed, and that on June 16th he duly qualified, filed his official bond and entered into possession of the property of the alleged bankrupts. It then alleges that on June 16, 1923, at 9:30 A. M. the involuntary petition in bankruptcy was duly filed in the office of the Clerk of the District Court. The receiver filed an answer
197 to the petition in which he denied various allegations contained therein, but he did not deny the allegation that the petition in bankruptcy was filed in the Clerk's office on June 16, 1923, at 9:30 A. M.

At the hearing on the Reclamation Petition before the Special Master the attorneys for the claimant and those for the trustee for the bankrupts stipulated certain matters and "agreed that throughout the petition the reference to 'the day said petition in bankruptcy was filed against said K. N. & K.,' or any similar allegation, shall mean only 'June 15, 1923' (this refers particularly to
198 paragraphs Eighth, Ninth, Tenth, Eleventh and Thirteenth)."

The paragraphs thus referred to are those which contain the allegations as to the time when the three checks herein involved were delivered, credited and collected and that when the petitioners caused the checks to be delivered to the bankrupts for collection and deposited to the petitioners' account they did not know of the bankrupts' insolvency, and also that when they caused the checks to be delivered to the bankrupts they had a credit balance with the said bankrupts amounting to several thousand dollars and were not then and

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have not been at any time since indebted to the bankrupts or to the receiver.

This stipulation as to the meaning of "the day said petition in bankruptcy was filed" cannot have the effect of a determination binding upon this court upon the question of the time when the petition was legally filed so as to determine the rights of the parties as affected thereby. Neither do we understand that the parties meant anything more than that the court should understand that the allegations in so far as they refer to the occurrence of an act on the day when the petition was filed 200
the allegation referred to June 15, 1923. And we hold that the petition was filed not on June 15th, when it was presented at 10:30 P. M. to the District Judge, but on June 16, at 9:30 A. M. when it was filed in the Clerk's office.

The word "filed" has not been defined by Congress. It has, however, a well defined meaning. It signifies the delivery into the actual custody of the proper officer designated by the statute, and whose duty it is to keep the records of the court. It carries with it the idea of permanent preservation of the thing as a public record. A paper is not filed by 201
presenting it to the judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the Clerk of the court for the purpose of making it a part of the records of the case. See United States v. Lombardo, 241 U. S., 73, 76; Laser Grain Co. v. United States, 250 Fed., 826, 831; Emmons v. Marbelite Plaster Co., 193 Fed., 181; In re Von Borcke, 94 Fed., 352.

In the case under consideration the claim is based upon three checks:

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1. A cashier's check of the Irving Bank-Columbia Trust Company, dated June 14, 1923, for $3,000.

2. A cashier's check of the National City Bank of New York, dated June 15, 1923, for $1,294.

3. A check of Goldman, Sachs & Co., dated June 15, 1923, drawn on the Bank of America for $15,000.

We shall consider them in the order named.

203 The Three thousand Dollar check. This check may be found in the margin.[1] The check did not indicate on its face that it was for the account of the petitioners. But the bankrupts on June 14th, the day the check was dated and the day on which the bankrupts received it, gave to the Irving Bank-Columbia Trust Company a receipt in which they stated the check was received "for account of N. Latzko & A. Popper, Budapest." The Special Master held this indicated that the bankrupts undertook to collect the check as an agent for Latzko and Popper. He held that the proceeds, when collected, would have been the property of

204 the Budapest house were it not for the allegation in the petition that the *petitioners caused* the

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[1] "Treasurer's Check. No. K10217
New York, 6/14/23.
IRVING BANK-COLUMBIA TRUST COMPANY
Woolworth Building
Pay to the Order of Knauth, Nachod & Kuhne, New York City, $3,000.00 Three thousand and 00/100—not over Three thousand ($3,000) Dollars through New York Clearing House
Countersigned:
F. J. MORAN.
G. W. Bugel,
Treasurer."

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Irving Bank-Columbia Trust Company, who drew the check, to deposit it for the account of the petitioners with the bankrupts. He thought therefore that when the check was so deposited and credited and collected all prior to the filing of the petition in bankruptcy, the bankrupts had become debtors to the petitioners, and the proceeds of the check amounted to a debt due from the bankrupts to them.

This check was credited by the bankrupts to the claimants' account on June 14, 1923, the day before the petition in bankruptcy was presented. And 206
on the same day that the bankrupts credited the check to the claimants' account they indorsed the check to the American Exchange National Bank, and that bank on the same day credited the bankrupts with the amount of the check. The check was collected by the American Exchange National Bank through the New York Clearing House on June 15, 1923. This was the day the petition in bankruptcy was presented to the District Judge—though prior to the filing of the petition.

The District Judge in his opinion confirming the Special Master's report, states that this check was 207
collected the day the petition in bankruptcy was filed, and then goes on to say:

> "The proceeds of the first check clearly became part of the assets of the bankrupts prior to the hour when the petition was filed. I can see no reason for invoking the rule that the law will take no account of the fractions of a day to defeat the bankrupts' title. It would be as tenable to hold that two lis pendens filed at different hours on the same day imposed an identical lien. The claimant cannot pre-

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vail as to the first check and the master's report as to it should be confirmed."

We fully agree that the law will take no account of the fractions of a day to defeat the bankrupts' title. It is true that for some purposes fractions of a day are not recognized in law. Louisville v. Portsmouth Savings Bank, 104 U. S., 469; McGill v. United States Bank, 12 Wheat., 511. But the rule that a day is an indivisible period of time is a mere legal fiction, which is subject to numerous
209 exceptions. And one of them is that the courts will disregard the fiction as where it is necessary to protect a completed act or save a vested right, or to determine the conflicting rights of rival claimants when they depend upon priority in fact (Johnson v. Smith, 2 Burr, 950; Cincinnati First National Bank v. Burkhardt, 100 U. S., 686; Westbrook Mfg. Co. v. Grant, 60 Me., 88; Hoyt v. San Francisco &c., R. Co., 87 Cal., 610; Jackson Brewing Co. v. Wagner, 117 La. Ann., 875; Johnson v. Pennington, 15 N. J. L., 188; Brainard v. Bushnell, 11 Conn., 16; Neale v. Utz, 75 Va., 480).

But we do not agree with the District Judge as
210 respects this check that it was actually paid on the morning of June 15th and prior to the filing on the same day, but at a later hour, of the petition in bankruptcy. That petition, for reasons already stated, was not "filed" on June 15th when it was presented to the District Judge but on June 16th when it was deposited in the Clerk's office. Inasmuch as prior to that time the amount of the check had been credited to the petitioners in their account with the bankrupts, and to the bankrupts in their account with the American Exchange National Bank, the amount of the check had been

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actually collected. The bankrupts accordingly had become debtors to the petitioners prior to the filing of the petition in bankruptcy and the amount of the check was a part of the estate which on June 16, 1923, passed to the receiver of the estate of the bankrupts.

But there is another reason for reaching the same conclusion. The deposit of this check with the bankrupts who were conducting a banking business, although made by the Irving Bank-Columbia Trust Company, was made by it as the agent of the petitioners and deposited under their instructions. It was therefore in effect as though deposited by the petitioners themselves. If it had been in fact deposited by them to be credited in their account, and the bankrupts indorsed it and credited it in their account the bankrupts, when so crediting it, would have made themselves at that time debtors in that amount to the petitioners, as no agreement is shown that the petitioners had no right to draw on checks deposited to their credit in their regular checking account until collection was actually made.

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In Foley v. Hill, 2 Cl. & Fin., 28, in the House of Lords, the effect of a deposit in a bank was fully discussed by Lords Cottenham, Brougham and Lyndhurst. They concurred in the opinion that the relation between a banker and customer, who pays money into a bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor. And in Bank of the Republic v. Millard, 10 Wall., 152, 155, the Supreme Court, in 1869, declared:

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> "It is no longer an open question in this court, since the decision in the cases of The

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Marine Bank v. The Fulton Bank, 2 Wall., 252, and of Thompson v. Riggs, 5 Wall., 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor."

In St. Louis & S. F. Ry. Co. v. Johnston, 27 Fed., 243, A, who had an account in B bank in New York, deposited in the bank a sight draft drawn by him on a corporation in Boston. The bank credited him with the amount of the draft as a
215 cash deposit. The bank was insolvent at the time but it forwarded the draft to its collection agent at Boston and it was paid after the bank had failed and closed its doors. Judge Wallace, sitting in the Circuit Court for the Southern District of New York, held that the draft was not the property of A when paid by the drawee and that he was not entitled to recover the amount thereof from the receiver. He said: "When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper just as a like credit is given for the rest of the deposit, the act evinces unequivo-
216 cally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper."

In Burton v. United States, 196 U. S., 283, certain checks on a bank in St. Louis were sent from that city to the payee, in Washington. The payee on receiving them indorsed them and deposited them in a bank in Washington and were immediately credited in the payee's account. The checks were afterwards paid in due course by the St. Louis

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bank. The court held that the Washington bank acquired the title to the checks when the deposit was made and credited in the depositor's account. The court said:

> "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal

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effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defend-
221 ant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank (the bank of deposit) was its owner when sent."

The trial Judge in the Burton case had instructed that the effect of the deposit of the checks in the Washington bank depended upon the understanding and intent of the bank and the depositor. That if the intent and understanding was that the bank should become the purchaser of the check and be the absolute owner thereof then the payment to the Washington bank amounted in law to
222 a payment to that bank and not to the depositor. But if the intent and understanding of the bank and the depositor was that the Washington bank should act as the agent of the depositor then the payment in St. Louis was in law a payment to the depositor. The Supreme Court held this was error, and that there was no foundation for submitting to the jury the question as to what the understanding of the parties was at the time the deposit was made. And this it held because the uncontradicted evidence showed that there was no agreement or understanding of any kind other than such as the law makes from the transaction detailed.

223

This court in In re Ruskay, 5 Fed. (2d) 143, 149, stated that where a check or draft is indorsed and deposited in a bank and is accepted as cash it at once becomes the property of the bank and the bank becomes the debtor of the depositor in the amount of the check so deposited with the superadded obligation that the money is to be paid when demanded by check. In the absence of special agreement to the contrary, or some notice to the contrary given to the depositor prior to or at the time of the deposit, such is the rule as to the effect of the transaction.

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The New York Court of Appeals in Craigie v. Hadley, 99 N. Y., 133, laid down the law as follows:

> "The general doctrine, that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. The transaction, in legal effect, is a transfer of the money, or drafts, or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

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The general rule is undoubted that checks deposited in a bank for collection remain the prop-

226 erty of the depositor (Clark Sparks & Sons Mule &c., Co. v. Americus National Bank, 230 Fed., 738; Richardson v. New Orleans Coffee Co., 102 Fed., 785; Philadelphia v. Eckels, 98 Fed., 485; Fifth National Bank v. Armstrong, 40 Fed., 46; Blair v. Hill, 165 N. Y., 672; Perth Amboy Gas Light Co. v. Middlesex County Bank, 60 N. J. Eq., 84; South Park Fidelity &c., Co. v. Chicago, Great Western R. Co., 75 Minn., 186).

In 7 C. J., 599, the law is stated as follows:

227 "One depositing paper in a bank may part with his title at the time of such deposit by a special agreement *or by an indorsement in blank;* and the general rule is that, where such paper is indorsed in blank, the first bank, or any other bank through which it may pass, indorsed in the same manner, acquires a legal title * * *."

It is our opinion that when the bankrupts received this check payable to their order without restriction and credited it in the petitioners' checking account, the relation of debtor and creditor
228 was thereby established on June 14, 1923. If not established then there can be no question but that it was established on June 15th when the check was collected. And as the petition in bankruptcy was not filed until June 16th there can be no doubt that the receiver in bankruptcy, and not the petitioners, was entitled to the proceeds of the $3,000 check.

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THE TWELVE HUNDRED AND NINETY-FOUR DOLLAR CHECK. This check may be found in the margin.[1]

The petitioners alleged in their petition that on June 15, 1923, they caused the National City Bank of New York to deliver to the bankrupts this check to be collected for the account of the petitioners, and that it was to be so collected appears on the face of the check itself. For the words "Favor N. Latzko and A. Popper, Budapest," seem to us, on the whole, not to differ in effect from "Collect for N. Latzko and A. Popper, Budapest." A check so 230
drawn cannot be said to be freely negotiable. Any payee to whom it was indorsed would take the proceeds when collected not for himself but for N. Latzko and A. Popper.

The bankrupt received the check on June 15, and on the same day they indorsed it in the manner disclosed in the margin.[2]

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[1]"No. F. T. 261365 New York, June 15, 1923.
Cashier's Check
THE NATIONAL CITY BANK OF NEW YORK
Pay to the Order of
KNAUTH, NACHOD & KUHNE, New York—$1294.00 231
Favor N. LATZKO & A. POPPER, Budapest.....
One Thousand Two Hundred Ninety-four and 00/100 Dollars
Payable only through New York Clearing House
N. G. LENFESTEY,
Cashier.
J. W. ALLALE,
Asst. Cashier."

[2]"Pay to AMERICAN EXCHANGE
NATIONAL BANK
Or Order
June 15, 1923,
KNAUTH, NACHOD & KUHNE
New York, N. Y.
1-548 1-548"

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An examination of the check and the indorsement thereon disclosed to the American Exchange National Bank that it did not thereby acquire title to the check and that the proceeds did not belong to it or to the indorsers but to N. Latzko and A. Pepper. The nature of the transaction was not affected by the fact that the bankrupts when they received the check credited it on June 15th, in the account of the petitioners, or that the subsequent indorsee, the American Exchange National Bank when they received the check on June 15th at once
233 credited it in the account of the bankrupts. The bank did not receive the proceeds until June 16, and when they received it it was not as their money and not as the money of the bankrupts but as the money of N. Latzko and A. Pepper, the petitioners herein. The right of the petitioners to the proceeds of the check is not to be defeated by the fact that the bankrupts credited it in the petitioners' account before it was collected, or by the fact that the American Exchange Bank credited it in the indorsers' account. They might do so at their own risk but not at the risk of the petitioners. The pro-
234 ceeds of the check, whenever it was collected, belonged to N. Latzko and A. Pepper. And nothing the bankrupts could do prior to its collection could deprive them of their right to the fund.

In 1909, in Re v. Chillicothe Branch of State Bank, 15 F. C. Co., 154, Case No. 2,197, Mr. Justice McLean and the Supreme Court, sitting on Circuit Justice, had before him bills drawn by customers of a Chillicothe, Ohio, on Ellis Ludlow of New York, on order of the Ohio Life Insurance and Trust Company, payable to the order of the indorsee, indorsed "credit my account, Branch B. Bank, Chillicothe." The indorsement was held to be

restrictive and put an end to the negotiability of the bill. It was an appropriation of the proceeds of the note which rendered any other appropriation of them illegal. It was said that if a bill be restrictively indorsed a subsequent indorsee takes it upon the same trust that was devolved upon the first indorsee. "He is a mere agent and trustee for his principal, and whoever takes the money holds it under a similar trust."

In Bank of the Metropolis v. First National Bank of Jersey City, 19 Fed., 391, in the Circuit Court for the Southern District of New York, the plaintiff sent the checks to the Mechanics' National Bank of Newark, for collection, with the qualified endorsement, "For collection; pay to the order of G. L. Baldwin, cashier." The Newark Bank sent the checks for collection to the defendant. After the defendant received the checks the Newark Bank became insolvent. Judge Wallace held that the indorsement by plaintiff "for collection" was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds to another. He said: "As was held in Civil Bank v. Bank of Maryland, 22 Md., 148, the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark Bank was merely its agent for collection."

In re Lowenbrooks, 209 Fed., 109, a depositor indorsed checks in blank and received credit for the same in his passbook. The bank contained a notice that "deposits of checks shall not be drawn against until collected." These checks were subjected to their own account in other banks and were in due time collected, but collection had not been made

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when the receiver in bankruptcy took possession of the banking house in which the original deposits were made. This court held that in the absence of the special agreement between the depositor and the bank the title to the checks would have passed to the bank, and the bank would have become merely a debtor to the depositor for the amount entered in the passbook. The question presented was whether a depositor who is credited with the face of checks which he has agreed not to draw against until they shall have been collected, has by
239 the act of deposit parted with the title to the checks so deposited. Under the circumstances stated this court thought that the course of business shown created the relation of principal and agent and was in effect the same as though the checks had been indorsed "For collection and deposit to the account of the depositors." The court pointed out that if prior to the bankruptcy proceeding the agency had been fulfilled by collection of the checks the moment the bank got the money on the checks the relation of debtor and creditor would have arisen.

In White v. Miners' National Bank, 102 U. S., 658, a draft was indorsed "Pay to A or order for
240 account of B." The court held that by the terms of the indorsement A became merely the agent of B for the collection of the money. The plaintiff relied on two propositions. The first of these is that words are merely directory and capable of explanation, and when it is shown by parol testimony, as in this case, that the plaintiff bought and paid full value for the draft, with the understanding that he was buying it as commercial paper, with the usual incidents of such a transaction, the indorsee is liable in the usual manner, notwithstanding the words we have quoted. The other proposition is that such is the custom of bankers who deal

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in such paper in New York, where these drafts are payable, and that the custom must control the construction of the contract. Mr. Justice Miller, writing for the court, after stating the two propositions on which the plaintiff relied, said:

"We are not satisfied that either of these propositions is sound.

The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make White the agent of the bank for the collection of the money.

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If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to controllict it.

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But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case. For assuming this to be correct, we think the plaintiff was still entitled to recover more than he did."

The legal effect of the transaction was merely to enable White to collect the money for the bank of

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it was held that where A, the payee of a check, indorses it to B "for account of A" B does not get title to the check but is merely the agent to collect it for A's benefit. It is our understanding that if A deposits a check in a bank in which he has a checking account, and endorses it for his account, and the bank credits it to his account, the title to the check passes to the bank and it becomes a debtor to the depositor for the amount thereof.

At the argument emphasis was placed upon the allegation made by petitioners in their petition that
245 they caused this check to be delivered by the National City Bank to the bankrupts, and we were told that the effect of the transaction must therefore be the same as though this check had been brought in by the petitioners. And that if the petitioners had brought it in and the bankrupts had at once placed it to the credit of the petitioners the relation of debtor and creditor would then and there have been established between them. It may be true that if petitioners had presented the check for collection and it was agreed between them and the bankrupts that it was to be credited before collection, such would have been the effect of the
246 transaction. But there was no such agreement made between them or on their behalf.

It is our opinion that the words on this check "Favor N. Latzko and A. Popper, Budapest" restricted the payee's power over the check. The words were equivalent to an indorsement for collection. A check made payable to a payee in favor of another is not freely negotiable and the payee holds it as an agent until he has collected and credited it. As this check was not collected until June 16, 1923, "during banking hours," we think the money collected on the check was the property of the petitioners at the time the petition in bank-

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ruptcy was filed on the morning of that day at 9:30 A. M., and therefore did not pass to the Receiver in Bankruptcy.

THE FIFTEEN THOUSAND DOLLAR CHECK. This check may be found in the margin.[1]

The petitioners alleged in their petition that on June 15, 1923, they caused Goldman, Sachs and Company to deliver to the bankrupts this check "to be collected" by the latter for the account of the petitioners. This allegation was in terms similar to that made respecting the $1274 check above considered. But the check which was introduced in evidence differs from that check in that it does not disclose that it was to be collected for the petitioners.

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At the time this check was delivered to the bankrupts they accompanied it with a letter explaining it was for account of petitioners. The letter is in the margin.[2]

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[1] GOLDMAN, SACHS & CO.

No. 69679 New York, June 15, 1923.

THE BANK OF AMERICA

Pay to the Order of

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KNAUTH, NACHOD & KUHNE $15,000

Fifteen Thousand Dollars.

Passed
FWV

J. M. HUMPHREY.

[2] New York, June 15, 1923.

Knauth, Nachod & Kuhne
New York.

We hand you herewith our check for Fifteen Thousand ..... Dollars for account of Landeggen, Budapest, by order of Julius Baer & Co., Zurich, to pay cable, June 15, from same.

Please sign the attached receipt and return to bearer. $15,000.

GOLDMAN, SACHS & CO.

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On receipt of the check, on June 15th, the day prior to the filing of the petition in bankruptcy, the bankrupts credited it to the account of the petitioners. They on the same day indorsed the check "Pay to American Exchange National Bank or order," and delivered it to that bank. And that bank also on the same day credited the bankrupts with the amount of the check in the bankrupts' account. But the check was not actually collected until the following day "during banking hours." The petitioners state in their petition that this col-

251 lection was made after the petition in bankruptcy was filed, but as they also allege that the petition was filed on June 15, and the facts show that it was not filed until June 16th, we do not know whether collection was actually made before or after the filing of the petition. And in the view we take of the matter it is unimportant whether collection was made on June 16th prior to the hour when the petition in bankruptcy was filed or on a later hour on the same day.

The important fact is that this $15,000 check is on its face a straight unrestricted cashier's check

252 payable to the order of the bankrupts. The petitioners state they caused Goldman, Sachs & Company, as their agents, to deliver it. The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn, that it was to be placed in the account of the petitioners. This they did as the agents of the petitioners. The legal effect of the transaction was the same as though the petitioners had themselves deposited the check "for our account" with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the

check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account. That transaction made the American Exchange National Bank the owner of the check on June 15th and the proceeds when collected on June 16th belonged not to the petitioners or to the bankrupts but to the bank which was the owner of the check when it was collected. We think the transaction is governed by the rule laid down in the Burton case, and that the relation between the petitioners and the bankrupts on June 15th, when this check was credited by the latter to the former, was that of creditor and debtor, and that the proceeds of this check when it was collected on June 16th did not belong to these petitioners. The finding of the court below, as to this check, was not erroneous.

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The authorities cited in what we have said respecting the check for $3,000 are equally applicable to this check for $15,000.

Before concluding this opinion we may remark that while the petitioners alleged in their petition that at the time the bankrupts accepted the checks and deposited them they knew full well that they were insolvent and unable to meet their obligations, and that they knew of the preparation of the original involuntary petition in bankruptcy filed against them.

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It was also alleged that at the time the checks were delivered to them the bankrupts wrongfully, fraudulently and with intent to defraud the petitioners held themselves out as a solvent and solid banking house whereas they were insolvent and unable to pay their debts.

The answer interposed by the trustee denied any knowledge or information sufficient to form a be-

256 lief as to the allegation. This was not an admission of the truth of the petitioners' allegation and was sufficient to put the petitioners to their proof (1 Encyc. of Pl. & Pr., 947; Federal Equity Practice, vol. 1, sec. 726).

If the bankrupts knew they were hopelessly insolvent and could not go on when they received the checks, and credited the same in the accounts of the petitioners, they acted fraudulently in doing what they did and the petitioners would be entitled to rescind the transactions involved and the bank-
257 rupts would hold as trustees ex maleficio subject to the petitioners' right of reclamation (St. Louis & San Francisco Railway Company v. Johnston, 133 U. S., 566). The mere fact of insolvency is not enough. The insolvency must be of such a character that it was manifestly impossible for the bankers to continue in business and meet their obligations and that fact must have been known to them when they accepted the deposits (Fidelity & Deposit Co. v. Kelso State Bank, 287 Fed., 828, 830; Quin v. Earle, 95 Fed., 728). But the burden was on the petitioners to show these facts and this they have not done. The record does not disclose
258 that any evidence was introduced before the Special Master in support of the allegations that the bankrupts knew they were insolvent and could not go on when they received the checks and credited them in the petitioners' account.

The decree is affirmed as to the checks for $3,000 and $15,000, and is reversed as to the check for $1,294.

Petition for Partial Rehearing. 259

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

In the Matter
of
OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, 260
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER, 261
Petitioners-Appellants,

MIDDLETON S. BORLAND,
Trustee-Appellee.

TO THE HONORABLE CIRCUIT JUDGES OF THE SECOND CIRCUIT:

The petition of ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business un-

262 der the firm name and style of N. LATZKO and A. POPPER, appellants, showeth unto your Honors that, being aggrieved by a part of the decision rendered in this cause on the 7th day of December, 1925, by which your petitioners were found to be entitled to the proceeds of a certain check for $1,294, drawn to the order of Knauth, Nachod & Kuhne, bankrupts, by the National City Bank of New York for the account of your petitioners, and were found to be not entitled to the proceeds of certain checks for $3,000, drawn to the order of
263 the said bankrupts by the Irving National Bank-Columbia Trust Company for the account of your petitioners, and for $15,000 drawn to the order of the said bankrupts by Goldman, Sachs & Company, and accompanied by instructions from said Goldman, Sachs & Company to the said bankrupts, that said check was delivered to them and constituted a payment to them for the account of your petitioners;

AND your petitioners' particular and only present grievance being that part of said decision which held that your petitioners were not entitled to the
264 proceeds of said check for $15,000.

NOW your petitioners respectfully state that the grounds of their said grievance are as follows:

(a) That although this court held in its said decision that neither said bankrupts nor their trustee ever had title to the proceeds of the said check for $15,000, your Honors did not award the proceeds of said check for $15,000 to your petitioners.

(b) That the delivery of the check for $15,000 by said bankrupts to the American Exchange National Bank, although it might have constituted the

American Exchange National Bank the owner of said check as between it and the said bankrupts, did not divest the title of your petitioners to the proceeds thereof paid by the American Exchange National Bank to the trustee for said bankrupts; 265

(c) That the fact that the American Exchange National Bank might have acquired title to the proceeds of said check for $15,000 is immaterial for the determination of the said appeal, as the American Exchange National Bank did not retain the said proceeds, but paid them to the trustee for the said bankrupts, thereby unjustly enriching 266 the estate of the bankrupts by $15,000, the property of your petitioners.

(d) That the fact that the American Exchange National Bank might have acquired ownership to said check for $15,000, as aforesaid, did not affect the right of your petitioners to claim the proceeds of said check from the trustee of said bankrupts in a reclamation proceeding between them and the said trustee, since the said trustee has no better title to the proceeds of said check for $15,000 than said bankrupts had, and the said trustee does not stand in the shoes of the American Exchange National Bank; 267

(e) That, as between your petitioners on one hand, and the said bankrupts and their trustee on the other, the said bankrupts had complete notice that said check for $15,000 was delivered to them for collection by reason of the written instructions accompanying said check;

(f) That the effect of restrictive instructions in regard to negotiable instruments is identical, irrespective of the fact whether the same are written on the negotiable instruments themselves or are contained in writings accompanying the same, in

268 so far as the persons, having notice thereof, as is the case with the bankrupts herein, are concerned;

(g) That your petitioners completely fulfilled the burden of tracing the proceeds of the said check for $15,000 into the hands of the trustee for the said bankrupts.

(h) That upon the principles applied by this court in its said decision in regard to the said check for $1,294, the title to the proceeds of said check for $15,000 was and is in your petitioners and not in the trustee for the said bankrupts.

269 That said questions of law were not argued on the hearing of said appeal, and your petitioners humbly pray for leave to reargue no other points of law except the above mentioned. That said points of law became important for the just and proper determination of the said appeal only as a result and because of the said decision of your Honors distinguishing the law applicable to the said check for $15,000 from the law applicable to the said check for $1,294.

270 WHEREFORE, your petitioners humbly pray that your Honors will grant a rehearing, humbly submitting to such orders as the court may make in the matter.

Dated, New York, the 18th day of December, 1925.

ALEXANDER LATZKO,
WILLIAM LATZKO,
CHARLES LATZKO,
SAMUEL POPPER,
EMIL HOCHSTEIN,
By BRODEK & RAPHAEL,
Attorneys-in-fact.

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I, CHARLES A. BRODEK, an attorney and counselor at law of the several courts of record in the State of New York, and of the above court, DO HEREBY CERTIFY that as one of the counsel for the petitioners named in the foregoing petition, I have examined the proceedings against them, and the opinion of the above court rendered on the 7th day of December, 1925, and carefully inquired into the matters set forth in their foregoing petition, and I believe the same are true.

Dated, New York, the 18th day of December, 1925. 272

CHARLES A. BRODEK,
Counsel for Petitioners.

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274 **Order Modifying Decision Below.**

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York on the 14th day of December, one thousand nine hundred and twenty-five.

Present—Hon. HENRY WADE ROGERS,
" MARTIN T. MANTON,
" LEARNED HAND, Circuit Judges.

275

In the Matter
of
OSCAR L. GUBELMAN, et al.,
Bankrupts,
ALEXANDER LATZKO, et al.,
Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

276 This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed as to the checks for $1,000, and $15,000 and is reversed as to the check for $1,294.00,

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.
M. T. M.

Order Denying Petition for Rehearing.

277

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 27th day of January, one thousand nine hundred and twenty-six.

278

Present—Hon. HENRY WADE ROGERS,
" MARTIN T. MANTON,
" LEARNED HAND, Circuit Judges.

In the Matter
of
OSCAR L. GUBELMAN, et al.,
Bankrupts,
ALEXANDER LATZKO, et al.,
Appellants.

279

A petition for a rehearing having been filed herein on behalf of the petitioners;

Upon consideration thereof it is

ORDERED that said petition be and hereby is denied.

H. W. R.
M. T. M.

280 **Clerk's Certificate.**

United States of America,
Southern District of New York, } ss.:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 80, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of

281 In the Matter of

Oscar L. Gubelman, et al.,
Bankrupts,

Alexander Latzko, et al.,
Appellants,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said court to be hereunto affixed, at
282 the City of New York, in the Southern District of New York, in the Second Circuit, this 2nd day of March in the year of our Lord one thousand nine hundred and twenty-six and of the Independence of the said United States the one hundred and fiftieth.

WM. PARKIN,
Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.